the name of the company. See also *McPherson Company Law* (2nd Ed) p 394 et seq.

Re Diamond Fuel Company[3] is also authority for the proposition that, despite the fact a liquidator had been appointed, a residual power of appeal remains vested in the directors.

After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case it is expressly provided in s 253(2) of the Act. The only question is who should move the appeal on behalf of the company.

An earlier decision of this court in *Rajannan s/o Ravaniah & Ors* v *Sivalingam s/o Arumugam Karuppiah*[4] is to be distinguished. There the notice of motion for stay and the supporting affidavits were filed by the directors and shareholders of Tamil Osai Sdn Bhd, the company, and they together with the company filed a motion for stay of the winding-up order pending appeal. The application for stay was allowed by this court although the appeal itself was subsequently dismissed.

As the present motion before us was not properly before the court, we upheld the preliminary objection and dismissed the motion with costs.

Motion dismissed.

Solicitors: *Murthi & Partners; Cheang & Ariff.*

Reported by *Prof Ahmad Ibrahim*

Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus

HIGH COURT (PENANG) — CRIMINAL APPLICATION NO 44-62-89
EDGAR JOSEPH JR J
22 JULY 1991

Family Law — Custody — Application for habeas corpus — Parties are Muslims — Whether High Court has jurisdiction to deal with the matter — Administration of Muslim Law Enactment 1959 (Penang), s 40(3) — Courts of Judicature Act 1964, ss 23 & 24 — Guardianship of Infants Act 1961, ss 5 & 11 — Civil Law Act 1956, s 27 — Federal Constitution, arts 4 & 121

Civil Procedure — Jurisdiction of High Court — Custody of child — Parties are Muslims — Whether High Court has jurisdiction to hear application — Whether court of kadi or kadi besar constituted under s 39 of the Administration of Muslim Law Enactment 1959 (Penang) has exclusive jurisdiction

Islamic Law — Administration of — Jurisdiction of courts of kadi and kadi besar — Custody of Muslim child — Jurisdiction of court of kadi or kadi besar to hear application

In this case the applicant, the father of a child whose mother had died, applied for a writ of habeas corpus in respect of the child. The child was in the care of the respondent, the maternal grandmother of the child. The learned trial judge treated the application as an application for custody of the child and considered the question whether the court has jurisdiction to deal with the matter.

Held, deciding that the High Court has jurisdiction to deal with the application:

(1) There is nothing in s 40(3) of the Administration of Muslim Law Enactment 1959 of Penang which confers exclusive jurisdiction on the court of kadi besar in matters relating to the custody of children where the parties are Muslims and therefore the High Court also has jurisdiction to deal with the matter.

(2) Article 121(1)(a) of the Federal Constitution does not affect the jurisdiction of the High Court because the effect of s 4 of the Courts of Judicature Act 1964 is to render ineffective amendments to the Constitution pertaining to the jurisdiction of the High Court made after the date of its commencement unless made with retrospective effect.

[Bahasa Malaysia summary

Di dalam kes ini, pemohon, bapa seorang anak yang emaknya telah meninggal, telah memohon satu writ habeas corpus berkenaan anak itu. Anak itu berada dalam jagaan penentang, nenek sebelah ibu anak itu. Hakim yang arif mensifatkan permohonan itu sebagai satu permohonan untuk penjagaan anak itu dan mempertimbangkan soalan sama ada mahkamah mempunyai bidang kuasa menyelesaikan perkara itu.

Diputuskan, membuat keputusan bahawa Mahkamah Tinggi mempunyai bidang kuasa menyelesaikan permohonan itu:

(1) Tidak terdapat apa-apa di dalam s 40(3) Enakmen Pentadbiran Undang-Undang Islam 1959 Pulau Pinang yang memberikan bidang kuasa eksklusif kepada mahkamah kadi besar dalam perkara berkenaan dengan penjagaan kanak-kanak di mana pihak-pihak berugama Islam dan oleh kerana itu, Mahkamah Tinggi juga mempunyai bidang kuasa menyelesaikan perkara itu.

(2) Perkara 121(1)(a) Perlembagaan Persekutuan tidak mendatangkan kesan ke astas bidang kuasa Mahkamah Tinggi kerana kesan s 4 Akta Mahkamah Kehakiman 1964 ialah menjadikan tidak berkesan pindaan kepada Perlembagaan berkenaan dengan bidang kuasa Mahkamah Tinggi yang dibuat selepas tarikh permulaannya, kecuali jika pindaan dibuat dengan kesan retrospektif.]

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 05-66-91.]

Cases referred to

1 *Myriam* v *Mohamed Ariff* [1971] 1 MLJ 265 (distd)
2 *Nafsiah* v *Abdul Majid* [1969] 2 MLJ 174 (refd)
3 *Roberts* v *Ummi Kalthom* [1966] 1 MLJ 163 (refd)
4 *Ali Mat bin Khamis* v *Jamaliah bte Kassim* [1974] 1 MLJ 18 (refd)
5 *Re Omar bin Shaik Salleh & Anor* [1948] MLJ 186 (refd)
6 *Inland Revenue Commissioners* v *Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 (refd)
7 *Phang Chin Hock* v *PP* [1980] 1 MLJ 70 (folld)

Legislation referred to

Administration of Muslim Law Enactment 1959 (Penang) s 40
Administration of Muslim Law Enactment 1952 (Selangor) ss 45, 46
Civil Law Act 1956 s 27
Courts of Judicature Act 1964 ss 23, 24
Federal Constitution arts 4, 121
Federal Constitution (Amendment) Act 1988
Guardianship of Infants Act 1961 ss 5, 11

Darshan Singh Khaira for the applicant.
Abdul Razak bin Yaacob for the respondent.

Cur Adv Vult

Edgar Joseph Jr J: Although this application is, on the face of it, for a writ of habeas corpus, it is, in substance and effect, an application for custody of a male child six years of age. The application is made by the father of the child (whose mother had died) and the respondent, in whose care the child is, is the maternal grandmother of the child. The parties are Muslims and so a preliminary objection has been taken by counsel for the respondent that this court has no jurisdiction to entertain the application because it is the court of a kadi or kadi besar constituted under s 39 of the Administration of Muslim Law Enactment 1959 of Penang which alone has such jurisdiction.

The Administration of Muslim Law Enactment 1959 of Penang establishes the courts of kadi besar (chief kadi) and kadi (s 40(1) and (2)). By s 40(3)(b), the general civil jurisdiction of the court of the kadi besar is defined as follows:

> (3) the Court of the Kathi Besar shall —
>
> (a) ...
>
> (b) in its civil jurisdiction, hear and determine actions and proceedings in which all the parties profess the Muslim Religion and which relate to:
>
> (i) betrothal, marriage, divorce, nullity of marriage, judicial separation, or nushuz;
>
> (ii) any disposition of, or claim to property arising out of any of the matters set out in subparagraph (i) of this paragraph;
>
> (iii) maintenance of dependants, legitimacy, guardianship or custody of infants;
>
> (iv) division inter vivos of sa-pencharian property;
>
> (v) wakaf or nazr; or
>
> (vi) other matters in respect of which jurisdiction is conferred by any written law:
>
> Provided that it shall not ordinarily try any offence or hear or determine any action or proceeding in respect of which any Court of Kathi has jurisdiction.

Myriam v *Mohamed Ariff*[1] was a Selangor case concerning an application by the mother for the custody of two children, a girl aged eight years and a boy aged three years. Earlier, in the kadi's court at Petaling Jaya, by consent of the parties a divorce with condition (talak, taliq) was granted; the condition being that the father should have custody of the children with access to the mother. The kadi's consent order giving custody to the father was made under s 46(1)(b) of the Selangor Administration of Muslim Law Enactment 1952. On behalf of the father, it was objected that such a consent order could not be appealed against in the High Court, regard being had to s 46(1)(b)(iii) of the Enactment, the material portions of which read:

> ... no appeal shall lie against a decision of the (Kathi) made by consent.

But, Abdul Hamid J (as he then was) construed this portion of the subsection as relating only to maintenance of dependants and not to custody of children. The court then founded its jurisdiction to hear the application by the mother on s 45(6) of the Enactment which reads:

> Nothing in this Enactment contained shall affect the jurisdiction of any civil court and, in the event of any difference or conflict arising between the decision of a court of the kathi besar or a kathi and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail.

The court went on to hold that ss 5 and 11 of the Guardianship of Infants Act 1961 were applicable by virtue of the Selangor Guardianship of Infants (Extension) Enactment 1961 as there was nothing to show that these provisions conflicted with or were contrary to the Muslim religion or custom of the Malays.

Turning to the present case, it is true that the Administration of Muslim Law Enactment 1959 of Penang contains no provision equivalent to s 45(6) of the Administration of Muslim Law Enactment 1952 of Selangor but, on the other hand, there is nothing therein which confers exclusive jurisdiction on the court of the kadi besar in matters relating to custody of Muslim children. It must therefore be determined whether, even without such provision, this court has jurisdiction to hear and determine the present application.

First of all, I would refer to the relevant provisions of the Courts of Judicature Act 1964 defining the civil jurisdiction and powers of the High Court.

Section 23 reads as follows:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try *all* civil proceedings where —
>
> (a) the cause of action arose, or
> (b) the defendant or one of several defendants resides or has his place of business, or
> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
> (d) any land the ownership of which is situated,
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
>
> (2) Without prejudice to the generality of sub-section (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.
> (Emphasis supplied.)

Section 24 reads as follows:

> Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include —
>
> (a) jurisdiction under any written law relating to divorce and matrimonial causes;
> (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act, 1981;
> (c) jurisdiction under any written law relating to bankruptcy or to companies;
> (d) *jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;*
> (e) jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind; and
> (f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the Court and to alter or revoke such grants.
> (Emphasis supplied.)

Section 4 reads as follows:

> In the event of inconsistency or conflict between this Act and any other written law *other than the Constitution in force at the commencement of this Act*, the provisions of this Act shall prevail.
> (Emphasis supplied.)

I must next refer to the Guardianship of Infants Act 1961 ('the Act') since it had been adopted to persons professing the Muslim religion within the State of Penang by the Guardianship of Infants (Adoption) Enactment 1961 but with the proviso, omitting immaterial parts, that nothing in the Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of 18 years who professes the Muslim religion and whose father professes or professed at the date of his death that religion.

In particular, I would reproduce ss 5 and 11 of the Act since they are not contrary to the Muslim religion or the custom of the Malays; they read as follows:

> Section 5
>
> Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property:
>
> Provided that the Court or a Judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent.
>
> Section 11
>
> The Court or a Judge, in exercising the powers conferred by the foregoing provisions of this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

I must next refer to two decisions of the High Court of Malaya which may assist in the resolution of the point at issue.

In the Malacca case of *Nafsiah* v *Abdul Majid*,[2] being an action for damages for breach of promise to marry, there was also a challenge to jurisdiction of the High Court to hear the suit but it was overruled by a rather different route from that adopted in *Myriam* v *Mohamed Ariff*.[1] In particular, the challenge as to jurisdiction was based on s 40(3)(b) of the Administration of Muslim Law Enactment 1959 which reads as follows:

> The court of the Kathi Besar shall in its civil jurisdiction hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to marriage.

Sharma J, in refusing to construe this provision as excluding his jurisdiction, relied on two pieces of legislation, namely, the Courts of Judicature Act 1964, which by s 24(a) and (b) specifically gave the secular courts jurisdiction in suits for damages and, more importantly, s 4 of the same Act, which confers an overriding authority on the secular High Court in cases where legislative inconsistency has to be resolved. Furthermore, s 109 of the Courts Ordinance 1948 (which was not repealed by the Courts of Judicature Act 1964) provides that in cases of inconsistency between the provisions of that Ordinance and any other legislation the provisions of the former shall prevail.

In *Roberts* v *Ummi Kalthom*,[3] Raja Azlan Shah J (now the Yang di Pertuan Agung) held that the High Court had power to hear and determine a claim to jointly acquire property of Muslims, despite the fact that jurisdiction to hear and determine such a claim was conferred by the Administration of Muslim Law Enactment on the kadi's court.

My research into the authorities (not cited to the court) compels me to the conclusion that although the Administration of Muslim Law Enactment 1959, Penang, does expressly confer general civil jurisdiction on the court of the kadi besar to hear and determine proceedings where the parties profess the Muslim religion and which relate, inter alia, to the guardianship or custody of infants, such jurisdiction is not exclusive. This is emphasized by the fact that the Guardianship of Infants Act 1961 has been expressly adopted (subject to the provisions of a proviso which do not affect the present case) to persons professing the Muslim religion within the State of Penang by the Guardianship of Infants (Adoption) Enactment 1961. Furthermore, the very wide terms of ss 23 and 24 of the Courts of Judicature Act 1964 when read together with s 4 of the same Act, to which I have referred above, provide strong reinforcement for that conclusion.

It makes no difference, therefore, that the Administration of Muslim Law Enactment 1959 of Penang does not expressly state, as do most of the equivalent State Enactments in the States of Malaya, that nothing in the Enactment shall affect the jurisdiction of any civil court and that in the event of any difference or conflict arising between a decision of a court of the kadi besar or a kadi and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail. Had there been such a provision in the Administration of Muslim Law Enactment 1959 of Penang, the position would, in my opinion, have been merely a fortiori.

The challenge to jurisdiction is, therefore, dismissed and I am now prepared to hear the application on its merits.

While tidying up the draft of this judgment, there are, I find, two omissions which I must repair. The first concerns the Penang Statute Law Revision Enactment 1965 while the second concerns art 121(1)(A) of the Federal Constitution.

More particularly, I have noticed that the Penang Guardianship of Infants (Adoption) Enactment 1961 had been repealed by the Penang Statute Law Revision Enactment 1965 with effect from 27 January 1966. However, I do not consider that this makes any difference to my conclusion that the challenge to the jurisdiction of this court should be dismissed. The ample breadth of the provisions of ss 23 and 24 of the Courts of Judicature Act 1964, when read together with s 4 of the same Act, (reproduced above) gives each High Court overriding jurisdiction in all civil proceedings in *any* civil cause arising within its local jurisdiction, subject only to the limitation (if any) imposed by the Federal Constitution in force at the commencement of the same Act. Specifically, of direct relevance to the question which arises for decision in this case, are those relating to the appointment and control of guardians of infants and generally over the person and property of infants. (See s 24(d).)

So, for example, in *Ali Mat bin Khamis* v *Jamaliah bte Kassim*,[4] a suit for, inter alia, the recovery of harta sepencarian, a matter within the jurisdiction of the court of the kadi besar according to the relevant legislation of the State of Negeri Sembilan, the High Court asserted jurisdiction relying on s 23 of the Courts of Judicature Act 1964. Wan Suleiman J (as he then was) said at p 19:

> ... I would not hesitate to hold that, short of specific words to that effect, the above provision of the Negeri Sembilan Enactment was not intended to take away the jurisdiction in civil matters given to a High Court by s 23 of the Courts of Judicature Act 1964.

I recognize, however, that the effect of the repeal of the Penang Guardianship of Infants (Adoption) Act 1961 by the Penang State Statute Law Revision Enactment 1965 renders inapplicable the Guardianship of Infants Act 1961 to persons professing the Muslim religion within the State of Penang but this does not affect the legal question of jurisdiction; it only affects the ethical question of the way in which that jurisdiction should be exercised, in particular, the way in which the court should exercise its discretion in selecting the appropriate rule for decision on the merits of the application for custody. In other words, it only affects the law to be administered by the High Court when exercising jurisdiction in *such* cases; that is to say, the principles to be applied when exercising its discretion in arriving at a decision on the merits of the application.

Amplifying the point, during the period 1961 to 1965, the law administered by the High Court when exercising jurisdiction in *such* cases was to be found in the Guardianship of Infants Act 1961. But, prior to and after that period, the law to be administered by the High Court when exercising jurisdiction in *such* cases, had to or would have to be selected, as the case may be, regard being had to the provisions of s 27 of the Civil Law Act 1956 which provides:

> In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.

Indeed, in *Myriam* v *Mohamed Ariff*,[1] the ethics of setting a standard for the exercise of discretion in deciding the application for custody on the merits was found within the framework of s 27 of the Civil Law Act 1956 which introduced English law as to custody 'regard being had to the religion and customs of the parties concerned ...'. The court then applied these standards to Muslim parties and held, relying on Syed Ameer Ali *Mohammadden Law* (6th Ed) Vol II (an Anglo-Muham-

medan precedent), 'that even under Muslim law the general principle that governs the custody of infants is the welfare of the infant'. In support, the Singapore case of *Re Omar bin Shaik Salleh & Anor*[5] was cited with approval.

There is another and more substantial ground for mounting a challenge to the jurisdiction of this court to hear the present application, and that is, art 121(1)(A) of the Federal Constitution which was inserted by the Constitution (Amendment) Act 1988 which came into effect on 10 June 1988 and reads as follows:

> The courts referred to in Clause (1) (the High Courts of Malaya and Borneo) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

It is obvious that the draftsman had intended by art 121(1)(A) to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the syariah courts. The only question which now arises is whether he had succeeded in that objective. If he has not then the court will not come to his aid as the decision of the House of Lords in *Inland Revenue Commissioners* v *Ayrshire Employers Mutual Insurance Association Ltd*[6] plainly illustrates. In that case, the draftsman's mistake was treated as being past correction by the addition of words. Lord Macmillan said that the 'legislature has plainly missed fire' while Lord Simonds observed at p 641:

> The section ... is clearly a remedial section, if that is a proper description of a section intended to bring further subject matter within the ambit of taxation. It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed.

In view of its pivotal importance regarding this part of the case, I must now, once again, reproduce s 4 of the Courts of Judicature Act 1964 which reads:

> In the event of inconsistency or conflict between this Act and any other written law *other than the Constitution in force at the commencement of this Act*, the provisions of this Act shall prevail.
>
> (Emphasis supplied.)

The Courts of Judicature Act 1964, except for s 5, came into force on 16 March 1964. Section 5 came into force on 16 September 1964. But, art 121(1)(A), as I have already noted, came into force only as recently as 10 June 1988 by virtue of Act A704. In other words, it was not in force at the date of the commencement of the Courts of Judicature Act 1964. Therefore, by virtue of s 4 of the Courts of Judicature Act 1964, ss 23 and 24 thereof would, in my opinion, still prevail to confer jurisdiction on this court to hear the present application. It would have been otherwise if art 121(1)(A) had been enacted with retrospective effect so as to have been in force at the date of commencement of the Courts of Judicature Act 1964.

I have not overlooked art 4(1) of the Federal Constitution which provides:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

It is true that the Constitution is the supreme law of the land, but 'law' in art 4(1), with reference to Acts of Parliament, means federal law consisting of ordinary laws enacted in the ordinary way and not Acts affecting the Constitution. Only the former must be consistent with the Constitution. As Suffian LP said in *Phang Chin Hock* v *PP*[7] at p 72:

> In our judgment, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in art 4(1); only such law must be consistent with the Constitution.

Section 4 of the Courts of Judicature Act 1964, in my view, is a provision affecting the Constitution because its effect is to render ineffective amendments to the Constitution pertaining to the jurisdiction of the High Courts made after the date of its commencement unless made with retrospective effect.

A final point needs to be made. Tan Sri Datuk Professor Ahmad Ibrahim in his article entitled 'The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law' [[1989] 2 MLJ xvii], has made the plea that s 4(1) of the Courts of Judicature Act 1964 be repealed. I would respectfully echo that plea so that effect may be given to the intention of the draftsman.

Order accordingly.

Solicitors: *Darshan Singh & Co; Razak & Co.*

Reported by *Prof Ahmad Ibrahim*